No. 6863

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator of the Estate of OMEY E. DYER, Deceased, and Charles E. Dyer,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

HON. CHARLES C. CAVANAH, District Judge.

HAWLEY & WORTHWINE,
JESS HAWLEY,
OSCAR W. WORTHWINE,
Residence: Boise, Idaho;
EARL W. CORY,
Residence: Blackfoot, Idaho,
Attorneys for Appellants.
H. E. RAY,
United States Attorney for the District of Idaho,
SAM S. GRIFFIN,
RALPH R. BRESHEARS,
W. H. LANGROISE,
Assistant U. S. Attorneys for the District of Idaho,
Attorneys for Appellee.
Residence: Boise, Idaho.

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SAM S. GRIFFIN,
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W. H. LANGROISE,
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I.

PRELIMINARY MATTERS.

Appellee criticizes the manner in which appellants opened their brief and states that the brief and record are strangely silent as to the cause of Omey E. Dyer's death. We urge that in the record there is an abundance of substantial evidence from which logical inferences can be drawn that the cause of Omey E. Dyer's death was due to the disability from which he was suffering when he came out of the Army.

Dr. Hampton treated Omey Dyer from the 28th day of July, 1919, until 1921 (Ts. 69). When the doctor first saw him he was weak and in a debilitated condition, very anemic, very thin, walked in a stooped position, he vomited incessantly (Ts. 70). This was caused by the dropping of the stomach and intestines and there wasn't any digestion, no peristaltic action to speak of (Ts. 70-71). That this condition continued until 1927 or 1928 is abundantly shown by the testimony of John A. Gardner (Ts. 34-41), Beulah Gardner (Ts. 53-56), C. A. Dunn (Ts. 56-61), and the testimony of Dr. Hunt (Ts. 61-69). Dr. Hampton attended him again in 1927 and 1928 and he sent him to the Boise hospital (Ts. 69) and found the same condition that he found when he first examined him on July 28, 1919, only it was aggravated worse (Ts. 72). Dr. Hampton also testified that the effect of Omey Dyer's working, as shown by the history of the case, was that if he tried to work it made this condition worse. Any men-

tal or physical work of any kind would aggravate the condition and the effect of his working and moving around would bring on this condition again—this vomiting and pain (Ts. 83). He also testified:

> "He came back to me in 1927 with the same condition existing, only worse, gradually getting worse and I say from the time I saw him in 1919, then again in 1927, his condition was worse." (Ts. 90)

And again he testified as to the effect of this work.

> "Q. Yes, that is what you said, that he could not do it, despite his history. Isn't that what you said?
>
> A. I said in my opinion he was totally and permanently disabled.
>
> Q. What do you mean by totally and permanently disabled?
>
> A. That he shouldn't work, and wasn't able to work, wasn't able to perform any duties, shouldn't be able to." (Ts. 90)

And again testified:

> "Q. When you sent him to the Boise hospital, what did you send him over there for—to the Boise Veterans Hospital in 1928.
>
> A. To see what they could do for him." (Ts. 94)

The doctor then testified also that when he had seen Omey E. Dyer in 1929 he found the same general condition of the stomach and bowels and at that time he re-

lieved him the best he could (Ts. 94-95). And it is admitted that he died May 1, 1929. (Ts. 26)

We believe that the fair inference from this testimony is that Omey Dyer died on account of the same trouble that he had when Dr. Hampton first saw him and that this condition continued from that time until his death and certainly the undisputed testimony of Dr. Hampton is that he should not have worked at all. Consequently, we believe we are justified in saying that this case comes squarely under the Carter case, 49 Fed. (2d) 221, which we quoted in the opening of our original brief as the principle of law underlying this entire case.

Comment is also made on the fact that the father, Charles E. Dyer, testified to certain facts. The fact is, as shown by the record, that Mr. Charley Dyer, the father, was deaf (Ts. 28) and couldn't hear very well (Ts. 29), and his memory was very poor (Ts. 28).

Comment is also made in appellee's brief, page 8, to the effect that the plaintiff demanded the service record of the plaintiff and not of Omey E. Dyer, the deceased veteran. The appellee is correct in this matter, for the record shows that on February 20, 1932, 20 days prior to the trial of this case, the plaintiff demanded the defendant to produce at the trial of this case, the service record of the plaintiff (Ts. 18-19). The inference to be drawn from the argument of the appellee on pages 8 and 9 of its brief is that the appellee did not understand that a demand was being made for the service record of Omey E. Dyer

and points out that the plaintiff was not the veteran, but the beneficiary, and that he never had a service record, and if he did, it was utterly irrelevant in the case, which only involved the physical condition of his son, Omey E. Dyer. If the appellee in this case desires to lead this court to believe that it was deceived by the wording of the demand and it did not produce the service record of Omey E. Dyer because it understood that a demand was being made for the service record of Charles E. Dyer, we are willing to allow the matter to rest in that situation. However, it will be observed that the complaint (Ts. 11-15) and answer (Ts. 15-17) make it clear that it was the insurance issued to Omey E. Dyer that was sued upon.

On page 9 of the record, appellee admits that it is going out of the record by calling attention to the fact that the plaintiff tried to take the deposition of the Secretary of War in order to secure a copy of the service record of Omey E. Dyer, which was in the appellee's possession. We doubt that it would be proper for us likewise to go out of the record and give the real reason why this deposition was not taken in time to be used in the trial of this case. Since the plaintiff made an effort to take the deposition of the Secretary of War, as stated by the counsel for the appellee, the only inference, it seems to us, that can be drawn is that the plaintiff's efforts to take the same were unsuccessful.

On page 12 of the brief, appellee states that Omey Dyer did not claim insurance benefits or ask compensation though he knew of them. The matter of the failure to

claim compensation has no place in this case, because as the Circuit Court of Appeals for the 8th Circuit said:

> "Not all soldiers claimed compensation, and the fact that such compensation may not be claimed is no evidence that the soldier might not have been entitled to it."
>
> United States v. Phillips, 44 Fed. (2d) 689.

Comment is also made on page 12 of the brief by appellee that a claim was not made for insurance benefits until the year after the insured's death. This, likewise, is a matter of argument before the jury and has nothing to do with whether or not there is substantial evidence in this case to support a verdict for, as was said in the Hayden case:

> "Like comment may be made upon the suggestion that evidently plaintiff did not think he was totally and permanently disabled or he would not have waited ten years to assert a right under the policy. These are all considerations for the jury."
>
> Hayden v. United States, 41 Fed. (2d) 614.

II.

THERE WAS NO SUCCESSION OF DISEASES.

On page 24, the appellee urged that there was a succession of diseases. We submit that this is not a proper inference to draw, as a matter of law, from the evidence. As we have heretofore pointed out in this case, the evi-

dence is clear, direct and positive to the effect that when Omey E. Dyer came back from the army he had a condition of the stomach and intestines caused by having been run over by a truck, which stayed with him throughout his life and caused his death.

The testimony of Dr. Hampton, which is undisputed, the appellee not having introduced any evidence, is conclusive that there was no succession of diseases after the policy lapsed, for the doctor testified from his personal knowledge that when he saw Omey E. Dyer in 1927 and 1928 he was suffering from the same condition that he found the first time he examined him, only it was aggravated (Ts. 71-72). He also testified after having read to him the complete history of Omey Dyer, that he was totally and permanently disabled at the time of his discharge from the army (April 25, 1919, Ts. 26, and the insurance was in force until May 31, 1919, Ts. 26; that his total and permanent disability was caused by being crushed by the truck (Ts. 82); and he found evidences of his having been injured manifested by his stomach and intestines being down low, down in the hypogastric region, and that this was caused by some injury. And then Dr. Hampton testified as follows:

> "Q. Doctor in your opinion, under this history I have read is it your opinion he continued to be totally and permanently disabled up to the time of his death?
>
> A. Yes.

Q. And the cause of that continuance was the same thing?

A. Yes, the same thing."

(Ts. 82-83)

On page 25 of appellee's brief, counsel argues that this case does not come under the Sligh and Acker cases, because Dr. Hampton did not testify that the work was a "serious peril to the life or health of the insured." Of course, Dr. Hampton did not use the words of the court in the Sligh and Acker cases, and, in our opinion, had he done so, this, in itself, would have cast a suspicion on his testimony. But he did testify substantially to the same effect and he testified that in view of the history of Omey E. Dyer that the effect of Omey Dyer's attempts to carry on the work he did was to make his condition worse, and that any mental or physical work of any kind would aggravate the condition and that his walking around would bring on this condition of vomiting and pain (Ts. 83). He also testified in regard to the work that was claimed by counsel for appellee, that the doctor didn't think that he should work at all (Ts. 89). And again he testified that he shouldn't work, that he wasn't able to work, wasn't able to perform any duties, shouldn't be able to (Ts. 90). Clearly, this brings this case under the rule laid down in the Sligh, Acker, Meserve, Burke, and Griswold cases.

III.

OMEY E. DYER'S WORK RECORD DOES NOT BAR RECOVERY.

On page 32, counsel comments on the work record of

Omey Dyer from 1919 until 1921. We have covered this in our opening brief, but desire to call attention again to the fact that during this whole period, Omey E. Dyer was under the personal treatment of Dr. Hampton and that he testified that Omey E. Dyer shouldn't have worked, that during that time he was totally and permanently disabled within the definition from personal observation (Ts. 69-71). This period is covered by the testimony of Wesley C. Thompson (Ts. 46-51).

On page 33 of the brief, counsel argue that the work period from 1921 to 1923 is "sketchey" and that there is no evidence that he did not or could not work, or even that he did work under handicap. His condition during this period is covered by the testimony of John A. Gardner (Ts. 34-41), who was Omey Dyer's brother-in-law (Ts. 35) and he did not keep up his end of the work (Ts. 41) and the testimony of Beulah Gardner (Ts. 53-56) and also the testimony of C. A. Dunn (Ts. 56-61).

Appellee also calls attention to the fact that Omey Dyer made a living for himself and family and earned $2,000.00 a year and claims that this was in addition to a living for himself and family. The record shows that the partnership of Dyer and Gardner made about $4,000.00 a year, and that Omey Dyer received about $2,000 (Ts. 39). But the record also shows that Omey Dyer did not keep up his end of the work (Ts. 41) and the evidence does not show that this was in addition to a living for himself and family. Furthermore, Mr. Dunn, who let the

contracts to this partnership, testified concerning Omey Dyer:

> "He wasn't on the work all the time, but his partner was, and it was on account of his partner that the contract was kept up, and we probably wouldn't have signed the contract if it hadn't been for his partner. He became tired easily upon exertion and he couldn't stand but just a little work" (Ts. 58).

IV.

THERE WAS AMPLE EVIDENCE THAT OMEY E. DYER HAD BEEN INJURED BY BEING RUN OVER BY A TRUCK.

At the trial of this case appellee contended that there was no evidence that Omey E. Dyer had been injured, or run over by a truck while in the service. Pages 12-24 of appellee's brief are devoted to this contention, and this seems to be the principal point relied upon by the appellee.

We believe that the trial court placed too much importance upon the cause of total and permanent disability for as we comprehend the law, it is not so much the cause of the condition as the condition itself. It has been held:

> "The real issue in the case was as to the existence of a permanent total disability prior to July 31st, 1919. The cause of such disability is not of vital importance. It is the disability within the insurance period and not the cause of it which gives rise to the

cause of action. The cause of action is one in contract and the contract does not require proof of the cause of the disability."

Green v. United States, 57 Fed. (2d) 9 (8th C. C. A.)

But in addition we urge that there was competent evidence in the record unobjected to, to show that Omey E. Dyer had been run over by a truck.

On pages 12 and 13 of appellee's brief, referring to the injury of Omey E. Dyer by being run over by a truck, it is stated:

"But there was no evidence that this occurred in November, 1918, or at any other time, nor does appellant claim in his brief that he offered any competent evidence to prove this as a fact, nor did he so claim at trial."

This statement by appellee is not true (Ts. 78-79). Appellee also admits on page 13 that the record does show that Omey E. Dyer told two physicians in the course of treatment that he had been run over by a truck and then states:

"This, of course, was no evidence of the fact which was in issue and required competent evidence but only evidence of his having had this."

On page 62 of the transcript it was testified to by Dr. Warren C. Hunt without any objection being made by the defendant of any kind or character as follows:

"At that time he (Omey E. Dyer) gave me a history of his trouble. His history was that of long standing nervous difficulty and dating from his war service, wherein he had been injured in that service. His back and chest had been injured and he had been unable to work steadily since that time, since he had been mustered out." (Ts. 62) * * *"He also stated he had been run over by a truck which caused the injury." (Ts. 62)

And Dr. Hampton testified in regard to Omey E. Dyer:

"He gave a history of being injured in France, run over by a truck through here (indicating), over the stomach that way (indicating)." (Ts. 69-70).

This testimony was admitted without any objection of any kind or character. In fact the attorney for the appellee on cross examination further developed this matter (Ts. 68). These two doctors were called for treatment only and they were not called at the time they treated Omey E. Dyer for the purpose of testifying.

Appellee on page 13 of its brief in regard to these statements made by Omey E. Dyer to his doctors, says:

"This, of course, was no evidence of the fact which was in issue and required competent evidence, but only evidence of his having said this. Had it been offered through any other witness than his physician, it would have been inadmissible as hearsay; through his physician treating him it was admissible not as

proof of the fact of the injury, but as proof only that the physician was told this, and took it into consideration in his diagnosis or treatment, about the foundation for which the physician may testify."

We take it by the above statement that it is conceded that statements made by the patient to the physician at the time the patient is undergoing treatment by the physician are competent and admissible.

Jones on evidence states the rule to be:

"He (the doctor) may base his opinions upon a statement given by the patient in relation to his condition and sensations, past and present. Thus only can the expert ascertain the condition of the party; and he may, of course, be guided to some extent by the data thus furnished. Furthermore, it seems that the testimony of a physician in this regard is not confined to opinion. Where it appears that the physician testifying was called by the injured person in his ordinary professional capacity and for purposes of securing relief from pain and for medical treatment, and there are no circumstances casting suspicion on the genuineness of the utterance, all statements of symptoms and sufferings, whether past or present, and though involving statements as to the nature of the accident, if necessary to diagnosis by the physician, may be testified to by him."

Jones on Evidence, Second Edition, paragraph 1217, Vol. 3, page 2234.

In the case of Coghill v. Quincy, O. & K. C. Ry. Co., a personal injury case against a railroad, wherein the injured person's doctor testified as to statements made by the plaintiff to him while undergoing treatment, and the Court said:

> "It is urged that this part of the testimony was, at least in some substantial degree, made up of what plaintiff told the doctor, and therefore it was hearsay and inadmissible. It is a familiar rule that, where a physician is treating a patient, inquiry of such patient is a necessity to intelligent treatment. The wholly unreasonable supposition that the patient, in such circumstances, would give him false information, relieves the communication from the objection ordinarily attaching to hearsay evidence. But it is said that, if the attendance of the physician is for the purpose of preparing himself as a witness in a case then pending, or expecting to arise, different considerations enter, for, in that instance, there will stand a temptation to falsity, or at least magnify, the true condition. (Citations). In this case, while it can be gathered from the record that the doctor's attendance upon plaintiff was more than a year after the injury was inflicted, yet it does not appear whether he waited upon plaintiff merely to qualify himself as a witness, or to prescribe for him as a physician. We cannot say there was error, when error has not been made to appear. Ordinarily a physician comes to learn his patient's trouble, both from the knowledge he obtains

from him and his own examination. It is proper he should."

Coghill v. Quincy, O. & K. C. Ry. Co., 206 S. W. 912.

V.

SINCE THE EVIDENCE CONCERNING THE INJURY RECEIVED BY OMEY E. DYER WAS ADMITTED WITHOUT OBJECTION, IT IS IN EVIDENCE FOR ALL PURPOSES.

We urge that since the evidence as to Omey E. Dyer's having been injured in France by being run over by a truck was admitted without objection or limitation that it is to be considered and given its natural probative effect just the same as any other evidence.

The Supreme Court of the United States has decided this matter where certain hearsay evidence was admitted in a criminal case and said:

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible."
>
> Diaz v. United States, 223 U. S. 442, 56 L. Ed. 500.

If as the Supreme Court says, hearsay evidence which is admitted without objection is to be considered and given its natural probative effect, how much more probative

should be the testimony which it is claimed was hearsay, in this case where it was admitted without objection since the alleged hearsay consisted of statements made by a patient to his physician at a time when the patient was going to the physician for the purpose of securing treatment. The Supreme Court in the Diaz case above cited cites the following cases, to which we also refer:

Damon v. Carroll, 163 Mass. 404, 408, 40 N. E. 185.

Sherwood v. Sissa, 5 Nev. 349, 355.

United States v. McCoy, 193 U. S. 593, 598, 48 L. Ed. 805, 807, 24 Sup. Ct. Rep. 528.

Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 9, 51 L. Ed. 681, 685, 27 Sup. Ct. Rep. 407.

Neal v. Delaware, 103 U. S. 370, 396, 26 L. Ed. 567, 573.

Foster v. United States, 101 C. C. A. 485, 178 Fed. 165, 176.

See also Taplin & Rowell v. Harris, 90 Atl. 956 at 958 (Vt.)

In a Pennsylvania case, wherein it appeared that certain evidence was admitted which was unquestionably hearsay, but a motion was not made to strike it out, and the Judge commented upon it in instructing the jury, the Court said:

"The third assignment alleges error in that portion of the charge in which the court directs attention to

the fact that Mr. Schmeltz had testified he was the owner of the car which struck the plaintiff. There is no merit in this assignment. The testimony was before the court and the jury, and it was not only proper, but it was the duty of the court to direct the jury's attention to it. We have sustained the court's refusal to strike it from the record, and it was, therefore, competent testimony and to be considered by the jury."

Luckett v. Reighard, 248 Pa. St. 24, 93 Atl. 773, Ann. Cases, 1916A 662.

This ruling was later approved by the Supreme Court of Pennsylvania in Murray v. Frick, 277 Pa. 190, 121 Atl. 47, 29 A. L. R. page 74 at 77.

VI.

APPELLEE'S CASES ARE NOT IN POINT.

We will take up the cases cited in appellee's brief in the order in which they appear in the brief.

United States v. Crume, 54 Fed. (2d) 556 (Brief, page 11) does not help the appellee here, because in the Crume case the plaintiff's proof established that as a fact ever since his discharge he worked with some continuity, working sometimes 10 hours and sometimes 12 hours a day earning his livelihood, and further no medical proof was offered in support of his claim, and apparently the only doctor that did testify testified that the man was not totally and permanently disabled.

The case of United States v. Le Duc, 48 Fed. (2d) 789, is clearly distinguishable from the case at bar for the reason that Le Duc worked steadily from July 8, 1919, to September 29, 1919, and again for six weeks in the fall of 1919, then served about 20 months in the regular army and went to work again, and re-enlisted in the army in 1921, and deserted August 21, 1921, and then spent three years in a reformatory where he worked at manual labor in a stone quarry and did other work, and apparently there was no doctor produced who had ever seen Le Duc during his lifetime until December, 1925.

The next case cited, that of United States v. McPhee, 31 Fed. (2d) 243, is wholly unlike the case at bar. In the McPhee case the policy expired October 31, 1919. The evidence shows that McPhee went to work in September, 1919, and worked uninterruptedly until January, 1920, and testified "that he noticed some stiffness and pain in his shoulder in October or November, but it did not disable him, nor did he consult a physician with reference thereto." Clearly the plaintiff in that case could not recover on his own testimony and is wholly unlike the case at bar where the evidence shows that the veteran was in a hospital during service (Ts. 45) and went to see a doctor shortly after his discharge, which doctor testified he was totally and permanently disabled at that time.

The next case cited is that of United States v. Martin, 54 Fed. (2d) 554. The evidence in the Martin case showed that the man had worked practically continuously

since his discharge and that he had not consulted a doctor for five years. The court in the Martin case does say, however:

> "There are cases which rightly hold that notwithstanding one has worked continuously for long periods of time he might yet be found to be totally disabled if he has done the work upon sheer resolution, and at the risk or certainty of impairing his health or shortening his life."

And:

> "If Martin had shown either that he had worked though he was really not able to work, or that though able to work he had worked at the sacrifice of his health, we should not have felt warranted in disturbing the jury's verdict."

We submit that the case at bar comes under the above statements contained in the Martin case.

The next case cited by appellee is that of United States v. Lesher, 59 Fed. (2d) 53, and in this case this court affirmed the verdict of the jury where the evidence showed that the veteran had earned $4,080.00 from September, 1920, until September, 1922, and this court said:

> "The court does not weigh the evidence, but considers whether there is any or sufficient evidence to sustain a verdict. * * * And in war risk cases the most favorable construction should be given the evidence that is produced."

This is the principle which we contend should be sustained here. We did not ask a hypothetical question which was based upon a mere guess, but produced the first doctor that had treated the plaintiff after his discharge from the service and who had taken a history from the veteran while he was treating him, and the evidence that the veteran was injured by a truck went into the record without objection or without limitation, and as we have shown above, when it was so in the record, it was in for all purposes. Consequently it cannot be said that Dr. Hampton's opinion was based upon facts not proven. We have no quarrel with the rule of law that a hypothetical question upon which an opinion is to be given must include only a fair statement of such facts as are supported by evidence as is laid down in 11 Ruling Case Law at page 579, and in Philadelphia R. Co. v. Cannon, 296 Fed. 302, and Union Pacific R. Co. v. McMican, 194 Fed. 393.

The case of Eggen v. United States, 58 Fed. (2d) 616 cited at pages 23-24 of appellee's brief, is not in point, and can be readily distinguished from the case at bar upon the following grounds:

1. Eggen was discharged on August 24, 1919, and his own declaration, the certificate of his commanding officer and that of the medical officer who examined him are to the effect that he then had no disability.

2. His insurance lapsed October 31, 1919.

3. He was examined by a physician in September, 1919, "and that he then had symptoms indicating incip-

ient pulmonary tuberculosis; that he was advised to go to a sanitarium or to the Veterans' Hospital in order that he might be cured; that he did not go to the hospital or take any treatment, but worked intermittently on a farm, in the woods, for a wrecking company in Minneapolis, and as a section hand."

4. Apparently he was not again examined by a doctor until 1925 and was found at that time to have pulmonary tuberculosis in an advanced stage.

It will be seen from the above recitation of facts in the Eggen case that no doctor in the Eggen case testified that he was totally and permanently disabled while the insurance was in force, while in the case at bar we had the following medical testimony:

Dr. Hampton testified that on the 28th day of July, 1919, Omey E. Dyer came to his office for treatment (Ts. 69) and testified that he had no digestion owing to the condition of his stomach and intestines (Ts. 70), and also that at that time he was totally and permanently disabled (Ts. 71), and then on a history of the case testified that he was totally and permanently disabled at the time of his discharge (Ts. 82). That he found evidences of the injury (Ts. 82) and that any mental or physical work would aggravate the condition and would bring on this condition of vomiting and pain (Ts. 83). He also testified that the condition he found in 1919 was still there in 1927 and 1928 (Ts. 71-72). For the above reasons we do not believe that the Eggen case is at all in point here.

Further, the Eggen case seems to base its decision on the fact that the plaintiff had not filed his action for many years, thus overlooking the fact that Congress extended the statute of limitations after the decision of this court in the Sligh case, 24 Fed. (2d) 636, and that the report by the Senate Finance Committee, dated June 9, 1930, and known as Report No. 885 of the 71st Congress, second session, pointed out that many men were not familiar with their right to bring suit until after the old statute of limitations had run.

We assert that the Eggen case in some of the statements contained therein, whether necessary to the decision or not, violates the spirit of the Seventh Amendment to our Constitution, and contravenes the legislative policy of our Government as shown by the extensions of time granted to veterans for the filing of suits of this type. Paragraph 445, Title 38 U. S. C. A., 1932 Cumulative Annual Pocket.

Counsel also cites the case of United States v. Seattle Trust Company, 53 Fed. (2d) 435 (9th C. C. A.). This case is not at all similar to the case at bar, for the reason that in the Seattle Trust Company case the policy lapsed February 28, 1919, and the records show that the insured had worked from July, 1919, to June, 1920, and earned $1310.00, and then worked two months more in a garage, and then from the latter part of 1920 to the middle of 1924, and from the latter part of 1924 until 1925 he operated a theater, and this court said:

> "There is no medical testimony to the effect that the work or labor would aggravate his condition. On the contrary, the evidence tended to show that it probably was the best thing for him to have his mind occupied."

The testimony of Dr. Hampton in this case was to the effect that if he tried to work it made his condition worse; any mental of physical work of any kind would aggravate his condition and bring on the vomiting and pain (Ts. 83).

In the case of United States v. Perry, 55 Fed. (2d) 819, cited on page 26 of appellee's brief, the appellant worked ten years earning over $10,000.00 and was afflicted with a disease, for which work was beneficial rather than detrimental.

The case of United States v. Thomas, 53 Fed. (2d) 192, cited by appellee, is not in point at all because while the only medical evidence in the case showed that the insured could not do manual labor continuously, it did show that the man was not totally disabled from following other occupations or lines of work. Obviously that is not such a case as we have here for the reason that the evidence conclusively shows that Omey E. Dyer could not do any kind of work continuously, and that work or labor, either mental or physical, aggravated his condition.

The case of United States v. Wilson, 50 Fed. (2d) 1063, is not at all similar to the case at bar, for that case specifically shows that the insured went to work in the

textile mills, and worked practically continuously, up to the time of the trial, a period of eleven years, receiving about the same wages as others working with him at the same tasks. Obviously that case is not at all similar to the case at bar where the evidence shows that Omey E. Dyer was sick from the time he got back and it is admitted that he died May 1, 1929 (Ts. 26).

The case of United States v. Hanagan, 57 Fed. (2d) 860 (7th C. C. A.), is not in point here, for the reason that all the insured had in that case was an ankylosed knee, and he was able to walk without a cane, whereas in this case the testimony shows that the man's digestive system was seriously affected.

The case of United States v. Fly, 58 Fed. (2d) 217 is not in point here, for the reason that the facts showed that the veteran had worked at various jobs and had regular and continuous employment for 18 months immediately before the trial, and his employer testified that he performed the work satisfactorily.

The next case relied upon by the appellee is that of Nicolay v. United States, 51 Fed. (2d) 170. The facts in that case are clearly different. In the Nicolay case the policy lapsed for the non-payment of premiums on May 2, 1919. There was no medical evidence of any kind showing total and permanent disability at the time of discharge, and the evidence affirmatively showed that the insured was examined in January, 1922, by Dr. Owen, who took X-ray pictures and who believed him then to be

totally disabled because of chronic active tuberculosis, but Dr. Owen did not testify that he was totally and permanently disabled even in January, 1922. Nicolay was examined again in March, 1923, by Dr. Owen, who found chronic inactive tuberculosis, and he testified that he did not believe the insured to be permanently and totally disabled, and the court based its decision upon the distinct ground that the plaintiff's doctors had testified that the man was not totally and permanently disabled.

The next case cited and relied upon by the appellee is that of Roberts v. United States, 57 Fed. (2d) 514 (10th C.C.A.), in which case it appears that the insurance of the claimant lapsed October 31, 1919, and the insured worked from February, 1921, to May, 1921, and from May, 1921, to December, 1921, and from January, 1922, to May, 1922, at wages ranging from $20.00 a week to $90.00 a month, and from May, 1922, to October, 1928, worked at wages from $120.00 to $175.00 a month, and no doctor testified that the plaintiff was totally and permanently disabled at any time approximating the date when the insurance was in force.

In the case of Hirt v. United States, 56 Fed. (2d) 80, it appears that the insurance was in force to May 30, 1919. In April, 1919, the claimant was told by a doctor that his tuberculosis would be all right in six months if he had plenty of fresh air and rested. According to the record he did not consult a doctor again until November, 1924, and the plaintiff had worked more or less continu-

ously as a coal miner from about three weeks after he returned from the service until 1924.

The case of United States v. McGill, 56 Fed. (2d) 522, appellee's brief page 37, is clearly distinguishable from the case at bar, for the reason that in the McGill case apparently the plaintiff did not consult a doctor between the date of his discharge until 1927. Also there was proof without contradiction of continuous and gainful employment from July, 1919, to some time in 1922 and also employment thereafter.

The case of United States v. Hairston, 55 Fed. (2d) 825, is not applicable here for the reason that the first time the plaintiff saw a doctor was in January, 1922, almost three years after his discharge and no doctor testified that the plaintiff had ever been totally and permanently disabled.

The case of United States v. Barker, cited on page 38 of appellee's brief, is clearly distinguishable from this case because no real disability was disclosed and the insured had a long continuous work record and this court specifically said:

> "While some of the medical witnesses expressed the opinion that the infirmity was, at least in part, permanent, no one of them ventured to say that the disability was total."

And the plaintiff's own doctors testified that the insured was not totally and permanently disabled.

In United States v. Rice, the facts showed that the insured entered the employ of the railroad company as a common laborer and continued in that employment for two months, then in a store, and then worked for a railroad company continuously for four years.

We submit that the reading of the cases cited by the appellee in support of its contention that the direction of the verdict by the trial court should be sustained clearly illustrates the difference between the case at bar and those cases where the courts have held that there was no substantial evidence to support the verdict or the finding of the trial judge in directing a verdict.

The appellee introduced no evidence; Dr. Hampton's evidence is undisputed. In view of this record how can it be contended that there is no substantial evidence about which reasonable men might not differ? In view of the Seventh Amendment to the Constitution, how can a court say that the evidence in this case was not substantial, unless it does violence to the definition of total and permanent disability used in the insurance contract?

We believe that the principles of law contended for by appellee and the doctrine in the Eggen, Nicolay, Hirt and Roberts cases are too harsh; that they ignore the definition of permanent as being "based upon conditions which make it reasonably certain that it will last throughout the life of the person suffering from it" and that the definition provides for a recovery from permanent and total disability and the resumption of premium payments; that

they also ignore the rule that the statutes and regulations are to be construed liberally in favor of the veteran; and that such liberality of construction is the law cannot be questioned. See U. S. v. Sligh, 31 Fed. (2d) 735, (9th C. C. A.); U. S. v. Worley, 42 Fed. (2d) 197 (8th C. C. A.); U. S. v. Phillips, 44 Fed. (2d) 689 (2nd C. C. A.) U. S. v. Cox, 24 Fed. (2d) 944; Quirk v. U. S., 45 Fed. (2d) 631; Starnes v. U. S., 13 Fed. (2d) 212; White v. U. S., 270 U. S. 175; Mack v. U. S., 28 Fed. (2d) 602; U. S. v. Eliasson, 20 Fed. (2d) 821; U. S. v. Schweppe, 38 Fed. (2d) 595.

Instead of the Eggen and similar cases applying a liberal construction to the statutes and regulations, they have drifted back to an extremely strict and harsh construction and one that is not even applied to contracts of insurance issued by private insurance companies. Penn Mutual Life Ins. Co. v. Milton, 127 S. E. 140; Wenstrom v. Aetna Life Ins. Co., 215 N. W. 93; Foglesong v. Modern Brotherhood, 97 S. W. 240; James v. Casualty Co., 88 S. W. 125; Kerr on Insurance, paragraphs 285-386; Beach v. Supreme Tent etc., 69 N. E. 281; Storwick v. Reliance Life Insurance Co., 275 Pac. 550; Industrial Mutual Indemnity Co. v. Hawkins, 94 Ark. 417; 127 S. W. 457; 29 L. R. A. (N. S.) 635; 21 Ann. Cases 1029.

We also submit that in the Eggen and similar cases, the courts are overlooking the fact that the Constitution guarantees the right to a jury trial in a civil action, U. S. v. Lesher (9th C. C. A.), 59 Fed. (2d) 53, and are

also overlooking the fact that in a jury trial all that has ever been claimed for the trial or appellate court is the right to determine whther there is any substantial evidence (substantial as distinguished from a scintilla) to support a verdict and in jury trials it is neither the province nor the duty of the courts to pass upon the ultimate questions of fact. Obviously whether the courts are actually taking away from litigants the constitutional right guaranteeing a jury trial in a civil action depends upon the construction given by the courts to the word "substantial."

Knowing as we do that our Federal Courts are the greatest defenders of the Constitution we have, that the Federal Judiciary is the last resort for citizens who respect our Constitution, it is our solemn conviction that these same courts will be the last to invade that Constitution and violate its provisions under the guise of "no substantial evidence" and "evidence contrary to physical facts," when once their attention has been directed to the seriousness of the trend of their decisions.

We suggest that when a court is called upon to direct a verdict or set one aside on the ground that there is no substantial evidence to support the verdict that the court is placed in a difficult position. It must decide in a given case whether it is invading the Constitution of the United States and then decide what is substantial evidence, and in war risk insurance cases the evidence has to do with the ability of the human mind and body; with disease

mental and physical; with testimony lay and expert; with some diseases old as history and others recently named; but whether old or new, each one affecting the individual human being as a separate, distinct, operating industrial unit; and each capable of affecting one individual one way and another in a different manner and to a different degree.

Where is the line in a given case between deciding facts and deciding that there is no substantial evidence? We urge that in as much as the Federal Courts were created by the same Constitution that guarantees a jury trial in a civil action, and since they have been called upon to determine their powers under the Constitution to take cases from the jury, (Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; Barney v. Schmeider, 9 Wall. 248, 19 L. Ed. 648; Walker v. New Mexico R. Co., 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837; Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873; Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 532, 57 L. Ed. 879; Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720) that this self-determined power must give rise to a zeal to be absolutely sure that it is not extended to a point where it amounts in reality to a determination of the case on the merits; the danger, it seems to us, is that a determination that there is no "substantial" evidence or that the evidence is against the "physical facts" may actually become a determination that the plaintiff is not entitled to recover and that the *opinion* that the plaintiff should not recover is made the *decision* that there is no

substantial evidence. Since it is but a step from the "no substantial evidence" rule to the "not entitled to recover opinion," we know that the courts will be zealous to see that the Constitution is not invaded by the judiciary, for if error is committed, it is not error in the ordinary sense, but it is an invasion by the court of that very Constitution that creates the courts; the harm done the individual litigant against whom the error has been committed is one thing, but a greater wrong has been done the whole people by the destruction of their cherished rights.

Justice Storey more than one hundred years ago said:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares that 'in suits at common law, where the value in controversy shall

exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.' "

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

Surely, since the taking of a case from the jury and the directing of a verdict involve the possibility of taking away a right that "is justly dear to the American people" and one that "has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy" that the court will hesitate to enlarge upon the rule of "no substantial evidence" and evidence contrary to physical facts.

We submit that there was substantial evidence in this case to support a verdict and that the trial court committed error in directing the verdict for the appellee.

Respectfully submitted,

EARL W. CORY,
Residence: Blackfoot, Idaho,
and
JESS HAWLEY,
OSCAR W. WORTHWINE,
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Appellants.